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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

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To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Viacom International Inc. ("Viacom"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby opposes the petition for reconsideration filed by National Rural Telecommunications Cooperative ("NRTC") in the above-referenced proceeding.

I. Summary of Opposition

In its petition, NRTC requests that the Commission reconsider its First Report and Order implementing new Section 628(c)(2)(C) of the Communications Act of 1934, as amended ("Communications Act"), which was enacted by the program access provision of the Cable Television Consumer Protection and

Competition Act of 1992 ("1992 Cable Act" or "Act").[1] In particular, NRTC seeks to expand the scope of new Section 76.1002(c)(1) of the Commission's rules to mandate a per se prohibition against vertically integrated programmers from entering into any exclusive contracts with non-cable distributors, including DBS distributors. NRTC also asks the Commission to reconsider its decision not to award damages or attorneys' fees for violation of Section 628.

The Commission should deny NRTC's requests and adhere to the approach regarding these two issues the Commission outlined in the First Report and Order. This approach is fully consistent with the language and legislative history of the 1992 Cable Act and advances the public policy goal of promoting diversity in programming and competition among multichannel video programming distributors.

NRTC's proposal to ban all exclusive grants to non-cable distributors is directly contrary to the Act's language and Congress's intent. Ultimately, a blanket prohibition against such exclusive grants is likely to serve only the self-interests of some multichannel video programming distributors, including those of NRTC and DirecTv, Inc.,[2] while significantly reducing

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1 The Commission's First Report and Order was released in this proceeding on April 30, 1993, FCC 93-178, 8 FCC Rcd 3359 (1993) ("First Report and Order").

2 DirecTv, Inc. ("DirecTv") is a subsidiary of Hughes Communications, Inc. It functions as Hughes's DBS operating, customer service and program acquisition arm.

competition in the fledgling DBS industry -- results that Congress sought to avoid by enacting the 1992 Cable Act. Viewed in this light, the NRTC petition is an act of gross overreaching on its part. Viacom respectfully submits that the Commission should not permit itself to be used for such improper purposes.

NRTC's position that damages and attorneys' fees should be awarded to those aggrieved by a violation of the program access provision also disregards the language and legislative history of the Act. In setting forth the "appropriate remedies" for a violation of this provision, Congress specifically mentioned the Commission's power "to establish prices, terms and conditions of sale of programming. . . ." In contrast, Congress did not specify either damages or attorneys' fees. That omission is significant because Congress could have easily incorporated the damages provision of the Communications Act into the program access provision of the Act, but chose not to do so. Therefore, the Commission properly determined that damages and attorneys' fees should not be available under the program access provision.

II. The Commission's Approach To Implementing Section 628(c)(2)(C) Of The Communications Act Is Proper And Should Be Retained

Consistent with new Section 628(c)(2)(C) of the Communications Act, the Commission's First Report and Order restricted the ability of cable operators to enter into exclusive contracts with vertically integrated programmers (i.e., a programmer in which a cable operator has an attributable interest). See 47 CFR § 76.1002(c). NRTC now seeks to expand the scope of new Section 76.1002(c) to prohibit vertically integrated programmers from entering into any exclusive contracts with DBS or other non-cable distributors. In support of its position, NRTC simply asserts that exclusive arrangements represent a "'bottleneck' restricting competition and diversity in rural markets." Petition of NRTC, ¶21. However, NRTC's claim (1) is contrary to the language and legislative history of the Act, and (2) simply disregards what Congress and the Commission, supported by antitrust principles, have accepted: that exclusive agreements, particularly in an industry such as DBS that is in its infancy, can be procompetitive and are fully consistent with to make such exclusive contracts per se illegal, it would have done so. It did not.

On the contrary, Congress recognized that, in certain circumstances, even exclusive arrangements between a vertically integrated programmer and a cable operator should be permitted. Consequently, Congress explicitly limited its per se ban on exclusivity arrangements between vertically integrated programmers and cable operators to areas not served by a cable system. See Section 628(c)(2)(C). In areas served by cable, Congress imposed an affirmative obligation upon the Commission to consider on a case-by-case basis whether exclusive contracts with cable operators are in the public interest. See Section 628(c)(2)(D).

In contrast, nothing in the Act evidences an intent by Congress to ban -- either as a per se matter or on a case-by-case basis following a Commission review for public interest purposes -- exclusive agreements between vertically integrated programmers and non-cable distributors, including DBS distributors.

That Section 628(c)(2)(C) was intended to apply only to exclusive grants to the cable operator -- not to all exclusive contracts into which a vertically integrated programmer might enter -- is fully supported by the Conference Committee Report which states in relevant part:

> "[T]he regulations required . . . prohibit exclusive contracts and other arrangements between a cable operator and a vendor which prevent a multichannel video programming distributor from

> obtaining programming from a satellite cable programming vendor affiliated with a cable operator."

H.R. Conf. Rep. No. 102-862 102d Cong., 2d Sess. at 92 (1992) (emphasis added). This is precisely the approach taken by the Commission in adopting new Section 76.1002(c).

The decision of Congress to limit the scope of Section 628(c)(2)(C) to cable operators (and not to include non-cable distributors within its ambit) was not accidental. Indeed, it was entirely consistent with the principal concern of Congress to prevent cable operators -- who are virtually the sole providers of multichannel video program services to consumers -- from engaging in practices detrimental to the development of new technologies that would compete with cable, such as DBS.[3] Consistent with this concern, Congress imposed a total ban against exclusive contracts between vertically integrated programmers and cable operators in unwired areas. For good reason, no similar ban was enacted against exclusive agreements

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[3] *See*, *e.g.*, Congress's express finding that:

> "(2) For a variety of reasons . . . most cable

with non-cable distributors.[4] Therefore, NRTC's belated attempt

to impose such a blanket prohibition should be rejected by the satellite broadcast programming to subscribers or

[redacted]

exclusive agreements between vertically integrated programmers and either cable or non-cable distributors.

With respect to the issue of exclusive dealing, the Commission has accepted that "[a]s a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized." Id., ¶63. That conclusion is fully supported by well-established principles of antitrust law.

The Supreme Court long ago emphasized that exclusive dealing arrangements can be procompetitive. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1961). See also Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 44-47 (1984) (O'Connor, J. concurring). Accordingly, such arrangements are not considered per se illegal, but rather are judged on a case-by-case basis under the "rule of reason" standard. See Beltone Electronics Corp., 100 F.T.C. 68, 197 (1982) (application of the rule of reason test to exclusive dealing arrangements "simply reflects the courts' long-standing recognition that exclusive dealing may have procompetitive effects and purposes"). The question in any given case is whether the exclusive agreement would unreasonably foreclose access to a particular product or service. Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949). See also Beltone, 100 F.T.C. at 204 (a "proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any, for exclusivity").

Exclusive agreements are likely to be procompetitive especially when a new competitor seeks to enter a developing industry. As the Department of Justice has recognized, exclusive distribution agreements "may facilitate entry of a new producer into a market by enabling distributors to recover initial market development costs." Department of Justice, Vertical Restraint Guidelines, Guideline 3.1, 50 Fed. Reg. 6263, 6266 (1985).

These observations are particularly relevant in the context of alternative distribution technologies. For example, a DBS distributor must assume extraordinary risks and make substantial investments to launch its business and become a viable competitor. To justify that risk and investment, it is essential that DBS distributors offer, to the extent possible, programming packages to consumers that are <u>differentiated</u> from those of their DBS competitors. Exclusive arrangements will permit a DBS distributor to so differentiate its programming from that of its DBS competitors, thereby promoting competition. In addition, because of DBS's finite transponder capacity, any <u>per se</u> ban against the grant of exclusive rights to a DBS distributor will simply result in duplicative transmissions of the same programming, wasting such valuable transponder capacity and undermining, at the expense of consumers, Congress's objective of promoting program diversity. Moreover, it should be emphasized that exclusive agreements, such as those between USSB and the premium and basic program services offered by Viacom, do not entail any risk of harm -- now or in the future -- to competition between DBS distributors.[6]

Finally, a blanket prohibition against exclusive agreements between vertically integrated programmers and non-cable distributors, such as DBS distributors, would be contrary to the principle that the antitrust laws were enacted for the "protection of <u>competition</u>, not <u>competitors</u>." <u>Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.</u>, 61 U.S.L.W. 4699, 4703 (1993) (emphasis in original), <u>quoting</u>, <u>Brown Shoe Co. v. United States</u>, 370 U.S. 294, 320 (1962). Clearly in the context of the present DBS industry, a <u>per se</u> rule against such exclusive contracts would only serve the economic self-interest of USSB's principal competitor, DirecTv, as well as that of NRTC as

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6 For example, we understand that USSB's principal competitor, DirecTv, already has obtained exclusive rights from several major Hollywood movie studios to exhibit first-run feature length theatrical films on a pay-per-view basis. Thus, DirecTv has the right to exhibit movies <u>before</u> USSB offers them to subscribers to premium program services. We understand that DirecTv will also offer movies and other programming on a subscription basis through its distribution

a retail provider of direct TV programming to rural markets, while it would prevent USSB from successfully differentiating its product offerings and from becoming a viable competitor in the DBS marketplace. Moreover, because of USSB's severely-constrained transponder capacity vis-a-vis DirecTv,[7] DirecTv will

Commission should deny NRTC's request for reconsideration of Section 76.1002(c) of the Commission's rules.

III. The Commission Properly Determined the Remedies Available To Those Aggrieved by a Violation of the Program Access Provision

In the event a violation of the program access provision is found to have occurred, Section 628(e) of the Act states that "the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms and conditions of sale of programming to the aggrieved multichannel video programming distributor." 1992 Cable Act, § 628(e)(1). In setting forth appropriate remedies, the Commission determined that the 1992 Cable Act does not grant it the authority to assess damages against the programmer or cable operator. First Report and Order, supra at ¶81.

NRTC seeks reconsideration of that determination and requests that the Commission reserve the right to award damages. Petition of NRTC at 4-10. NRTC bases its argument entirely on provisions of the Communications Act of 1934 dealing with common carriers, which expressly provide for the award of damages in certain circumstances. Id. Of course, the provisions of Section 628 have been made a part of Title VI of the Communications Act, which deals with cable communications. That portion of the Communications Act generally evinces a determination that cable operators are not to be subject to regulation as common carriers. <u>See</u>, <u>e.g.</u>, 47 USC § 541(c).

Significantly, in setting forth the "appropriate remedies" to be available for violations of the program access provision, Congress specifically mentions the ability, <u>if necessary</u>, "to establish prices, terms and conditions of sale of programming . . . ." Where specific words follow general ones consider that can lead to legitimate variations in terms offered to various distributors. The essentially subjective nature of the remedies available to those aggrieved by a violation of the program access provision.

Respectfully submitted,

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July 14, 1993

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